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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

**SHIKEB SADDOZAI,**

Plaintiff,

**v.**

**RON DAVIS, et al.,**

Defendants.

Case No. 5:18-cv-05558-BLF (PR)

**REPLY BRIEF IN SUPPORT OF  
DEFENDANT'S MOTION TO DISMISS**

Defendant moved to dismiss this lawsuit because Plaintiff's third amended complaint makes unequivocally clear that he failed to exhaust his administrative remedies before filing suit. (ECF No. 32, *citing* ECF No. 29 at 2.) In opposition to Defendant's motion, Plaintiff attaches documents that further substantiate Defendant's position. As shown, prison officials found the second-level response to Plaintiff's administrative appeal constituted exhaustion of the prison's administrative remedies. (ECF No. 42 at 10.) The second level response was issued on November 6, 2018. (ECF No. 42 at 11–13.) Plaintiff filed this lawsuit on September 11, 2018. (ECF No. 1.)

1 The Ninth Circuit has made clear: “a prisoner does not comply with [the exhaustion]  
 2 requirement by exhausting available remedies during the course of the litigation.” *McKinney v.*  
 3 *Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). An action must be dismissed unless the prisoner  
 4 exhausted his available administrative remedies before he filed suit, even if the prisoner fully  
 5 exhausts while the suit is pending. *Id.* (“Congress has made a policy judgment that [the  
 6 expenditure of additional resources by the parties and the court in requiring a second suit be filed]  
 7 is outweighed by the advantages of requiring exhaustion prior to the filing of suit.”); *see also*  
 8 *Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006) (dismissing the prisoner’s suit where  
 9 exhaustion was completed after he sent his complaint to the court for filing but before the  
 10 complaint was actually filed).

11 Defendant requests Plaintiff’s lawsuit be dismissed without prejudice.

12 Dated: May 13, 2020

Respectfully submitted,

XAVIER BECERRA  
 Attorney General of California  
 WILLIAM C. KWONG  
 Supervising Deputy Attorney General

*/s/ Allison M. Low*

ALLISON M. LOW  
 Deputy Attorney General  
*Attorneys for Defendant*

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## CERTIFICATE OF SERVICE

Case Name: S. Saddozai v. Davis, et al.

Case No. 5:18-cv-05558-BLF (PR)

I hereby certify that on May 13, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

### REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On May 13, 2020, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Shikeb Saddozai (AY1590)  
California State Prison - Corcoran  
P.O. Box 3461  
Corcoran, CA 93212  
*In Pro Per*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 13, 2020, at San Francisco, California.

G. Pang

Declarant

/s/ G. Pang

Signature